



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Hon. Lloyd Kennedy
County Attorney
Cochran County
Morton, Texas

Dear Sir:

Opinion No. O-2585

Re: Where there are three candidates for the office of county judge, and one received 417 votes, and two received 296 votes each, how shall the County Executive Committee determine which of the two candidates, who tied for second place in the general primary, is entitled to enter the second primary?

Your recent letter states that in the general primary election in Cochran County, one candidate for the office of county judge received 417 votes and two other candidates received 296 votes each. With particular reference to Article 3126, Revised Civil Statutes of Texas, you request the opinion of this department as to how the County Executive Committee shall determine which of the two candidates who tied for second place shall be placed on the ballot for the second primary. You state that the Executive Committee desires to follow the procedure of Article 3126.

Article 3126 reads as follows:

"Art. 3126. 3124 TIE IN PRIMARY

If it appears that for a county or precinct office, the largest vote has been cast for two candidates for the same office, and that they have each received the same number of votes, the chairman of the executive com-

Hon. Loyd Kennedy, page 2

mittee shall, in the presence of the executive committee or the county convention, as the case may be, cast lots for the nomination in such manner as they may direct and in the presence of rival candidates, if they desire to be present, and declare and certify the name of that candidate who is successful by lot."

The terminology of Article 3126 "if it appears that * * * the largest vote has been cast for two candidates for the same office" strictly applies, it is believed, to the situation where the two candidates receiving the largest vote have each received the same number of votes, rather than to the situation where the sum total of the votes received by two candidates who have tied for second place exceeds the vote received by the candidate receiving more votes than either of them.

In this connection, Article 3106 must also be considered. It reads as follows:

"Art. 3106. 3091-2 MAJORITY OR PLURALITY VOTE

The county executive committee shall decide whether the nomination of county officers shall be by majority or plurality vote, and, if by a majority vote, the committee shall call as many elections as may be necessary to make such nomination, and in case the committee fails to so decide, then the nomination of all such officers shall be by a plurality of the votes cast at such election."

Presumably, the Cochran County executive committee has provided by proper resolution, as contemplated by this statute, that nominations for county and precinct officers shall be by a majority vote. And since no candidate, under the stated facts of your inquiry, received a majority of the votes cast for the office of county judge, it will be necessary to have a second primary election to select the Democratic party nominee for the office in question. We therefore notice Article 3102 in its following provision:

" * * * . Any political party may hold a

Hon. Loyd Kennedy, page 3

second primary election on the fourth Saturday in August to nominate candidates for any county or precinct office, where a majority vote is required to make nomination; but at such second primary, only the two candidates who received the highest number of votes at the general primary for the same office shall have their names placed upon the official ballot. * * * ."

However, since of the three candidates for county judge, one received less than a majority and two received the same number of votes for second place, it is seen that there are no two candidates who "received the highest number of votes at the general primary."

Whether the authority contained in Article 3106 for the county executive committee to call as many elections as may be necessary to make a nomination contemplates and authorizes the committee to adopt some such procedure in this situation is problematical in view of the general terminology of the statute.

We therefore have the anomalous situation arising which no statute expressly or by necessary implication regulates and controls. This being true, it would seem that the only solution would rest in the power and discretion of the executive committee of the party which would authorize the party through its committee to adopt a procedure whereby a party nomination by a majority vote may be secured, provided that the procedure so adopted does not conflict with any of the statutes regulating party nomination. This principle was recognized by Mr. Justice Hawkins, in the case of *BRENE v. WAPLES*, 108 Tex. 140, 187 SW 191, wherein it was declared:

"In the absence of constitutional or statutory restriction upon their duties and powers, the duly existing authorities of a political party, such as state and county executive committees, in accordance with party usage, may make and enforce all reasonable regulations relating to nominations within such party including reasonable assessments against any and all candidates for such nominations."

Hon. Loyd Kennedy, page 4

It was likewise declared by Mr. Justice Pier-
son in LOVE v. BUCKNER, 27 AL. 49 SW (2d) 425:

"We do not think it consistent with the history and usages of parties in this state nor with the course of our legislation to regard the respective parties or the state executive committees as denied all power over the party membership, conventions, and primaries, save where such power may be found to have been expressly delegated by statute. On the contrary, the statutes recognize party organizations including the state committees, as the repositories of party power, which the legislature has sought to control or regulate only so far as was deemed necessary for important governmental ends, such as purity of the ballot and integrity in the ascertainment and fulfillment of the party will as declared by its membership."

We are therefore of the opinion that the Cochran County Democratic Executive Committee would be authorized in its discretion to adopt the procedure outlined by Article 3126 and thereby determine which of two candidates for the office of county judge for Cochran County, each of whom received the same number of votes for second place in the general primary, may be placed on the ballot in the second primary election.

We reserve the question as to the authority of the committee to adopt any procedure other than that described in Article 3126 inasmuch as you have requested our opinion only with reference thereto.

APPROVED AUG 10, 1940

Glenn R. Davis

ATTORNEY GENERAL OF TEXAS

Yours very truly

ATTORNEY GENERAL OF TEXAS

Zollie C. Steakley
Zollie C. Steakley
Assistant

ZCS:eb



CTIN 6